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SUPPLEMENTARY MINUTE

ON THE

SYSTEM OF APPEAL AND RECORD

IN

CRIMINAL CASES,

DATED 20TH NOVEMBER, 1848.

CALCUTTA:

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No. 1230.

FROM THE REGISTER OF THE
SUDDER DEWANNY ADAWLUT,

TO J. P. GRANT, ESQ.,

Offg. Secretary to the Government of Bengal.

FORT WILLIAM, *the 20th November*, 1848.

SIR,

NIZAMUT ADAWLUT.
Present:
W. B. Jackson, Esq.,
Temporary Judge.

I am directed to forward to you, to be laid before the Hon'ble the Deputy Governor, the accompanying copy of a Supplementary Minute recorded by Mr. Jackson, on the system of Record and Appeal in Criminal trials, which formed the subject of my letter, No. 1167, of the 8th October 1847.

I have the honor to be,

Sir,

Your most obedient Servant,

B. J. COLVIN,
Register.

(Copy.)

Supplementary Minute on the system of Appeal and Record in Criminal Cases, dated 20th November, 1848.

1. In my Minute of the 8th October 1847, on the subjects on which the Government consulted the Court in the letter from the Secretary of the 23rd April 1845, I expressed my opinion that we

could not, in appeal, dispense with any portion of the record. It has since occurred to me that though we must have the whole record, still it is practicable to improve the nature of that record; and that such a change may be accompanied with other alterations in the present system of administration of criminal justice, conducive to its amelioration and to a reduction of labor.

2. In the trial of criminal cases, although the first point to be kept in view is the correctness of the judgment, the second is undoubtedly to avoid unnecessary delay; all time which passes between the perpetration of a crime and the punishment of the criminal is an evil, but it is in some degree unavoidable, in order to form a just judgment; delay beyond this should not be allowed.

3. The delay which occurs in the adjudication of such cases may be divided into three parts: First. The period between the apprehension of the prisoner and his being put on his trial. Second. The period during trial. Third. The period during which the decision is open to revision in appeal.

4. The delay in each of these divisions, appears to me to be unnecessarily great in the Bengal Presidency, and so far from being conducive to the primary object of judicial proceeding, the formation of a correct judgment, I believe this delay to be a fruitful source of error.

5. In the first place, as regards the period between apprehension and trial. Delay previous to apprehension is a matter of Police, and does not come within the scope of my remarks, though connected with it. The trial of an accused, under the present system, cannot take place until first, the whole of the evidence for the prosecution has been heard by the Darogah, and committed, word for word, to writing by his Mohurrir or Clerk: the answer of the prisoner is also recorded in the same manner. This part of the proceedings is usually the most bulky in size, and the most dilatory in point of time, the Police having to find as well as to examine the witnesses, and the agency at their disposal for recording the depositions being very small. This record of the Police is often a book of a foot or two feet thick.

6. Again, as the Police have no judicial power, after the whole case has been heard by them and recorded, unless the accused is released, the whole of the same proceedings must be again gone through by the Magistrate or his Deputy; the same evidence is all heard and written down over again in the presence of the Magistrate: this constitutes a second book of nearly the same thickness.

7. If the case is of a nature admitting of the Magistrate finally disposing of it, there is an end of it, unless it is appealed, in which case the whole case must be gone through by the Sessions Judge, and this not by reading it himself, but by its being read out to him, in open Court, by a native Mohurrir from the beginning to the end.

8. If the case is of a description not admitting of the Magistrate passing final sentence, it is committed for trial before the Sessions Judge; in which case the whole of the same evidence is again delivered *vivâ voce* in the Sessions Court, and again written down, word for word, in the language spoken, by a Clerk. This constitutes the third book, perhaps not of equal size with the Police or the Magistrate's book, because such portions of the evidence as have been found irrelevant or useless, are not heard again, but there is no great difference.

9. If the Sessions Judge can finally dispose of the case, it ends here; but, if, by reason of difference of opinion between the Sessions Judge and the Law Officer, or of the case requiring a heavier sentence than 14 years' imprisonment, the limit of the Sessions Judge's authority, or *of appeal* from the orders passed, the case is referred for the final orders of the Sudder Court, the whole of the proceedings of the Sessions Judge are again *copied out fair*, and are read out for the hearing of the Sudder Court from beginning to end; this constitutes the fourth book and the fourth hearing.

NOTE.—The appeal cases are not re-copied, but the record is sent in original.

10. The case thus, if a heinous one, is tried four times over, the evidence heard *vivâ voce* three times, and written down four times. If any material discrepancy occurs between the three several depositions of a witness, his evidence is liable to rejection. Now, many

circumstances may and do cause such discrepancy, the failure of memory on the witness' part, which is accidental, and far from improbable in uneducated persons, (or indeed among persons of any description,) or again, intentional variation from the former statement, with a view either to screen the accused, or to make the evidence stronger against him. When the prevalence of bribery and total disregard of the Bengallees for truth is considered, it is a wonder that the evidence ever holds good throughout such a scrutiny; it very often does not, in which case the accused has the benefit of its breaking down.

11. These repeated hearings and writings of evidence do not conduce to the formation of a correct judgment; on the contrary, they rather impede it, and they are evidently a positive and a great evil as occasioning hardship and distress to the witnesses, delay in adjudication, and expense in the pay of the establishment employed and required to carry out the system.

12. It is necessary that the Police Officer should hear the statement of the prosecutor and witnesses to enable him to proceed, but it is not necessary that he should have them written down, word for word. He may take his notes of the substance of them, at least of the charge and of the principal evidence and condense it into a report to the Magistrate in his own writing: there should be no other record whatever before the Police. The present voluminous proceedings of the Police are totally useless, inasmuch, as they are justly looked on with great suspicion by the Judicial Officers, and are, in fact, not received as evidence, except where they are in favor of the accused and opposed to subsequent statements; they therefore may operate towards acquittal but not towards conviction. This renders them worse than useless, for although the discrepancy raises doubt, it is by no means certain that the statement before the Police is the more correct of the two, indeed *cæteris paribus*, the contrary is more probable.

13. On trial there must be a record, if there is an appeal, or authority to revise, and it is to be considered, therefore, what is the best description of record.

14. The depositions are at present written down by a native Clerk in the language used by the deponent, and it is intended that they shall be, word for word, as uttered; I believe they are very fairly correct, though not strictly word for word. But it is not on these written depositions that the case is tried,—the presiding Judge, if he be fit to occupy the seat of judgment, tries the case on the words uttered *vivâ voce,* keeping notes of the substance of the same for subsequent reference. These notes contain the impression conveyed to the Judge's mind by the statements made before him, and unless the recording Clerk is more fit to try the case than the Judge, these notes are a more correct record of the statements made and the meaning intended to be conveyed, than the detailed record *in extenso* taken down by the Clerk. It is true the Clerk writes in the language spoken, which is his own native language, whereas, the Judge, if a European, would make his notes in his own language; but the Judge understands the language spoken, and has that advantage over the native Clerk, that he takes a more extended view of the bearings of what is said as regards the trial generally, in which he has to pronounce judgment, whereas, the native Clerk simply takes down the words mechanically, totally unconcerned as to their effect and bearing, and often without attention even to their meaning. It is singular how completely mechanical the agency of these Clerks is found, whether in writing down or in reading out papers. I have repeatedly found them utterly ignorant of the meaning of what they have read or written out a few minutes before, and even of what they were at the time actually engaged in writing or reading; I have also often had occasion to correct the record from my own notes. The Judge, on the other hand, is not so conversant with the *minutiæ* of the language, but he has the assistance of other persons present, whenever he feels a doubt as to the precise meaning; and I have no doubt that notes, thus carefully taken by the Judge, form a more correct record of the case, than the mechanical detail of the native Clerk: if it were otherwise, I say the Clerk is plainly the proper person to try the case, and not the Judge.

15. In appeal, the advantage of having the Judge's notes as the record, is obvious—the Appellate Authority, in the first place, finds the record in his own language, and can read it through without assistance; and in the second and most important, the case is submitted to him as it appeared to the presiding Judge; and this is the proper nature of an appeal. If the native Clerk's record is to be of higher authority than the Judge's notes on the occasion of a difference between them, the appeal is from the Judge to the Clerk, not from the Judge to the Appellate Authority; no one would contend for this, though such is positively the effect and result of having the record drawn out by any one but the Judge himself.

16. It is well known that the delay of taking down the evidence *verbatim*, by the Mohurrir, is so great, that, in some instances, the Judge allows the examination in chief to be taken down, (in his presence certainly,) but while he is engaged on other duties, with a view to save time, and then hears the written deposition read out in the witness' presence, and proceeds at once to cross examination should he think it necessary. This practice is objectionable, and would be impossible if the Judge's notes were the only record.

17. I would therefore suggest that the presiding Judge be required to take full notes in his own language, and that these notes be considered and held to be the record of the trial; and that no other record be required or admitted either in an Appeal Court or elsewhere.

18. The result of this rule would be, in the first instance, a great saving of expense in the salaries of the large number of native Clerks, who might be dispensed with,—greater correctness and authenticity in the record, which would not be liable to be purposely falsified or altered,—and greater facility and correctness in the disposal of appeals, which I do not hesitate to say, might be effected in one quarter of the time which they now occupy.

19. The only valid objection I have heard made to this plan, is, that some of our Judges and Magistrates are not sufficiently conversant with the language, to be trusted with the duty of drawing out

their own record of trial; I do not think there are many of the description, but if any such exist, it is beyond all question that such men are not fit to fill the stations they occupy. If a man cannot take down the substance of a deposition in his own language, he must be unfit, and, in fact, unable to decide a case upon his own judgment and should not be allowed to retain his office.

20. Another source of delay and even of denial of justice is to be found in the distance which parties and witnesses have to travel, in order to obtain a judicial decision of petty Criminal cases; a zillah is often 80 or 100 miles long, and of the same breadth, and the situation of the Sudder Station is seldom central: if, therefore, a case of misdemeanor, of trespass, assault, or petty theft, occur, the sufferer and witnesses must travel often 50 miles to the Sudder Station, and the same distance back, to obtain redress. Besides this hardship they have to suffer, in addition, the loss of their time in going, coming and waiting, the loss of time to a labouring man, being often loss of bread to himself and family. The reluctance to come forward, under such circumstances, is not to be wondered at. I believe that in such cases the Prosecutor is often a greater sufferer than the Offender.

21. Why such a system should be persisted in, when there is a Moonsiff, or judicial officer, with power to try civil cases to the extent of 300 Rupees, attached to each Police division, or Thanna, (or at least to many of them,) I do not know? It is absurd to suppose that the Moonsiffs cannot be trusted with the decision of petty criminal cases, when they are trusted with that of civil cases to so considerable an extent. If their proneness to be influenced by bribery, is advanced as a reason for not investing them with Criminal powers, it appears to me to be much more applicable to their exercise of civil authority; for where civil suits exist there must be property, and the means and ability to bribe, as well as the disposition, whereas in the petty Criminal cases to which I allude, the parties are generally too poor to exercise such influence. It is also to be observed, that, generally speaking, all parties and classes are interested in the punishment of Criminal offenders. The appointment of

Deputy Magistrates residing in the interior has had some effect towards an improvement of the system in this respect; but the number of them is very limited, and further, the Moonsiffs are better adapted for the trial of petty cases as they have no connection with the Police, and it is always desirable to separate the Police and judicial functions.

22. I would vest Moonsiffs with authority to try all such cases, and would require the charges to be brought before the Moonsiffs or Daroghas and no where else; and for the trial of these cases I would give the Moonsiffs power to sentence to fine and imprisonment not above 6 months: if the case required a higher degree of punishment, the Moonsiffs might refer it to the Magistrate. By these means, parties would have their Criminal Court in such petty cases, usually within 10 miles, or one day's journey of their homes. In cases of this description brought before the Darogha, his report should be to the Moonsiff instead of the Magistrate.

23. The Moonsiffs as well as all native Criminal Judges should draw out their notes as a record of trial, in the same manner as has been above suggested for European Officers: the native Officers would use the language with which they are most familiar.

24. It is scarcely necessary to point out what a mass of petty cases would, by such an arrangement, be taken off the hands of the Magistrate and his assistant; and I believe they would be better tried, from the facility of obtaining evidence on the spot, the greater willingness of the people to come forward, and the speed with which the cases would be disposed of.

25. There should be an appeal to the Magistrate in all such cases on grounds shewn, and he should be at liberty to remove cases pending before a Moonsiff to his own file, whenever he might see good reason to do so, assigning his reason in his proceedings.

26. It is evident that, besides the advantages of so employing the Moonsiffs, already pointed out, there would be that of economy; the agency of the Moonsiffs being very much cheaper than that of

the Magistrates, the work would thus not only be done better but cheaper.

27. The extent to which appeal is carried in our Criminal Courts, has, I believe, never been equalled elsewhere; every case is liable to revision, not merely when good grounds of dissatisfaction with the decision of first instance are stated, but whenever dissatisfaction is expressed, however unreasonable it may be.

28. Thus every case is liable to be tried over twice; and if the impression obtained by reading through the detailed record of the evidence by the native Clerk is different from that obtained from hearing the evidence *vivâ voce*, the decision is reversed or modified. Now, supposing the acuteness of intellect of the Presiding and of the Appellate Authority to be the same, there is a strong presumption in favor of the Presiding Authority, as he has heard the deposition given *vivâ voce*, and has had the advantage of observing how the statement was delivered by the deponent,—with the hesitation of doubt, or, with the precipitancy of personal rancour, or with the air of a person speaking by rote what he has been taught. All these considerations, with a thousand other circumstances, go to make up the opinion of the Presiding Officer, while the Appellate Court has nothing but the dead letter of the record, taken down by a Mohurrir whose mind was probably engaged in thinking of other matters during the whole time, or perhaps in contriving to falsify it purposely to suit his own views. I have already observed on such appeals. The same objection does not hold good to appeals when the presiding Judge's notes form the record, at least not to the same extent, because it is to be presumed that the notes convey the impression made by the witnesses on the mind of the Judge himself; they do not do so perfectly however, and the Appellate Court is still under some disadvantage: but it is necessary to have an appeal with a view to the correction of errors of law, of inference, and of ratiocination, and the record of the Judge's notes would be sufficient for this purpose,—at all events it is the best procurable.

29. But no appeal of right ought to be allowed, by which I mean a right to make the Appellate Authority read through and give an opinion on the case, when no sufficient reason is assigned in the petition of appeal for doubting the correctness of the decision of first instance; in lieu of this, which is the present practice, I would allow the Appellate Authority, on good ground, shown and assigned, either in a petition of appeal or obtained from other sources of information, to call for the record of a case and to revise, and, if necessary, alter it. No second appeal should be allowed, except to the Sudder Court, on a point of Law, and that Court should be restricted simply to the point of Law in their decisions on such appeals.

30. If Juries could be obtained, upon whom we could place sufficient reliance, no appeal whatever on a point of Fact ought to exist: but although this is not yet attainable, I am of opinion that the use of Juries may be further introduced than at present, with great advantage.

31. I would require the Sessions Judge to try all Sessions cases with the assistance of a Jury; and whenever the opinion of the majority of the Jury and of the Sessions Judge agreed, as to the guilt of the prisoner, I would allow no appeal whatever from the sentence of the Sessions Judge; of course the sentence must be legal,—it is otherwise void. Whenever the accused should appear to the Sessions Judge deserving of a severer punishment than he is competent to award, the record to be forwarded as at present for the orders of the Nizamut Adawlut, and the same course to be pursued when the Sessions Judge differed from the Jury.

32. I think the difference of opinion a fair ground of reference; it has not been so considered hitherto; but if the Juries are to be made really useful,—if they are to be any thing but a name,—some respect must be shewn to their opinion. This would raise them in in their own estimation and give them some importance. It seems to me, also, that the verdicts of Juries are, generally speaking, such as to entitle them to this consideration. In cases tried with their assistance, which have come before me, they appear often to have shewn much attention to the evidence, and much discrimination in their

verdict. The Law Officers would be very useful members of a Jury, though their opinions at present, being based on the barbarous principles of Mahomedan law, instead of common sense, are of little value.

33. I believe, that it would be necessary to require persons nominated to serve on a Jury to attend under a penalty: it is the practice of the English Courts of Justice; and there is no reason to believe that the attendance would be less irksome to the natives of India than to those of Great Britian. Measures should be taken to prevent the duty from falling too often on the same individual, but I conceive, that the Government is fully justified in enforcing attendance. The trial of these cases is for the benefit of the public generally; the inhabitants are all directly interested in putting down crime, and they ought to feel grateful for the opportunity thus afforded them of taking part in Judicial proceedings, in which they have so immediate and direct an interest. The magistrate should keep a list of all persons liable and competent to serve on Juries, and should warn a certain number, say ten of these, to be present at the commencement of each Sessions; from the number present the Sessions Judge should nominate a Jury of not less than three, nor more than five, to attend till the close of that Sessions: wilful neglect to attend should render a person liable to fine, say not above 500 Rupees.

34. I am disposed to think, that by degrees the natives of India would be led to look on this right to serve on Juries as a privilege, provided care were taken to prevent it from interfering too much with their private avocations. I am convinced that such Juries would be of the greatest service in unravelling difficult cases. If it be considered how ignorant the greater part of our Judges necessarily are, of the domestic routine of life among the various and numerous classes of natives of India, and how often the conduct of individuals is positively unaccountable, except with reference to these habits of routine, and to the firmly established way of thinking, which have grown up with them from infancy, habits too varying between different classes living in the same village together, more than they would be found to vary between different nations in Europe; I say

when the extent of the Judges' ignorance of these customs is considered, how defective must be their powers of eliciting the truth from a combination of circumstances and of evidence! As Europeans they cannot, even if they would, mix with the people, and, however, great may be their learning or judicial aptitude, they are and must be defective in that intuitive power of discriminating motives of conduct, which arises from an intimate knowledge of language, habits and probabilities: it is precisely this knowledge which a Jury, and nothing but a Jury, would supply. That perjury is frightfully common, is known, and admitted, and that it is most difficult to know when to reject a witness' statement, because the depositions, which are most strictly and closely consistent, are often, I think I may say generally, those which have been most carefully got up and learned, and are therefore the least deserving of confidence. On such occasions a Jury alone is competent to estimate the value of evidence. The only doubt remaining on my mind as to the advantage of a Jury, arises from the fear of wilful dishonesty in the verdict; but if we employ the natives as Judges without check, there is surely less objection to making use of them to the extent above suggested as Jurors, under the eye and direction of a European Judge.

35. The substance of the above propositions is shortly this.

36. That the practice of causing evidence in Criminal cases to be taken down and recorded by a Clerk, during the trial, be discontinued.

37. That the Officer presiding at the trial be required to take down the evidence in his own handwriting, and in the language with which he is most familiar, and that such notes be held to constitute the record of the trial, and that no other record be required or admitted.

38. To effect this, a modification of the Law is perhaps necessary, as Section 16, Regulation IX. 1793, requires that the deposition shall be written in the language with which the defendant is most conversant, but I conceive that the Government ought to possess the power to give directions as to the nature of the record, and to require such as may appear most advisable.

39. That no appeal be admitted unless there is *primâ facie* ground to doubt the correctness of the judgment of the Court, or Authority of first instance. Where no such ground is stated or apparent, an appeal should be rejected.

40. That Moonsiffs be generally vested with authority to try Criminal cases, and to receive and try Criminal charges of a petty description, with power to sentence to fine, not exceeding 50 rupees, and imprisonment, not exceeding six months: this may be done under the provisions of Act XV. 1843, without a new law.

41. That all trials at the Sessions be held with the assistance of a Jury, and that where the Judge differs in opinion with the Jury, a reference take place to the Sudder Court.

42. That any one neglecting to attend on a Jury, when duly summoned, be liable to a fine, not exceeding 500 rupees.

43. The result of this plan would, I think, be favorable to the administration of Justice, and the saving of expense would be very great. The whole of the petty work would be thrown, where it should be, in the hands of the local native Officers of the lowest rank, and the time of the Magistrates and their Deputies would be given to the heavier cases, and to the superintendence and improvement of the Police.

44. The relief of the Appellate Authorities would be very great, but the trials of first instance would, on the other hand, be rather more tedious; the balance would, however, be greatly in favor of the new system.

45. In the Sudder Court, especially, the work would be greatly lightened, the appeals would be less frequent, and more easily disposed of, as the Judges would read through the evidence with their own eyes generally, the references might be more frequent, in consequence of difference of opinion between the Sessions Judge and the Jury being made a ground of reference, but this would be a labor of utility, whereas at present we often read through large bundles of appeal cases unnecessarily.

46. To reduce the increase and decrease of work to be anticipated, to numbers, and thus to give a distinct comparative view,

is impossible; besides which, the objections are not to the quantity of work to be done, but to the quantity unnecessarily gone through; what is useful and requisite must be done, however, large it may be; I have therefore directed my proposal to the attainment of the object of getting rid of unnecessary work, rather than to the diminution of the gross quantity, though I believe this would follow as a natural consequence.

(Signed) W. JACKSON,
Temporary Judge.

(True Copy)

B. J. COLVIN,
Register.

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